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No. 09-863

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL RUSSO and JAMES GROSJEAN,

Petitioners,

v.

RODERICK O'NEAL and CHARLES POINTON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

REPLY TO BRIEF IN OPPOSITION TO PETITON FOR WRIT OF CERTIORARI

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ARGUMENT FOR GRANTING THE WRIT

The Nevada Supreme Court played with state law in order to avoid addressing the federal claim of Petitioners, Michael Russo and James Grosjean. State courts have a duty to enforce federal law. *Howlett v. Rose*, 496 U.S. 356, 369-370 (1990). Contrary to the assertion of Respondents, Roderick O'Neal and Charles Pointon, the Nevada Supreme Court did not validly apply state law. Under the pretense of using state law, the Nevada Supreme Court did not address the federal claim in the interim appeal claiming a lack of jurisdiction to review a proposed amendment to add a federal claim. Later, the Nevada Supreme Court avoided addressing the federal claim by asserting preclusion based on the earlier appeal. Respondents assume that the actions of the Nevada Supreme Court were valid relying on the erroneous analysis of the Nevada Supreme Court. This Court "has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid non-federal ground and whether that ground finds 'fair or substantial support' in state law." *Howlett*, 496 U.S. at 366 n.14. The Nevada Supreme Court invalidly applied state law that is neither fair nor supportable.

Respondents rely solely on this procedural error and do not substantively address whether federal qualified immunity applied or not to the Petitioner's proposed claim under 42 U.S.C. § 1983 (2009). The state courts erroneously applied the analysis for state discretionary immunity, Nev. Rev. Stat. § 41.032(2)

(2009), to the proposed federal claims. Pet. at 16-20. ("Pet." references the Petition for Writ of Certiorari.) Under the federal qualified immunity test of *Saucier v. Katz*, 533 U.S. 194, 201-202 (2001), the state courts erred in denying and affirming the denial of the proposed amended complaint where the state agents are not immune as a matter of law. *See* Pet. at 20-23.

Petitioners fully supported their arguments with citations to the documents in the Appendix. As to Respondents' contention that Petitioners misstated any fact in this matter, Opp. 13-16, Respondents give no support for these allegations. ("Opp." references the Opposition to Petition for Writ of Certiorari.) This matter arose from a motion to amend a complaint in response to a motion to dismiss. The "facts" come from 1) a document with which the Nevada Supreme Court allowed Petitioners to supplement the record and 2) the allegations from the proposed amended complaint. Alternatively, the "facts" are arguments.

I. LAW OF THE CASE IS THE PRECLUSION DOCTRINE THAT THE NEVADA SUPREME COURT MISAPPLIED IN ORDER TO AVOID THE FEDERAL ISSUE, NOT CLAIM PRECLUSION.

Petitioners did not mischaracterize the grounds upon which the Nevada Supreme Court avoided applying qualified immunity to the proposed 42 U.S.C. § 1983 claim in the second appeal. The Nevada

Supreme Court concluded that it was affirming the denial of the motion to amend the complaint "based on preclusion **and law of the case principles**." Pet. App. 1-23 at 22 (emphasis added). ("Pet. App." refers to the documents included in the Appendix to the Petition for Writ of Certiorari.). The Nevada Supreme Court found that "[t]hat decision [the interim appeal] stands **as the law of the case**. . . ." Pet. App. 1-23 at 6 (emphasis added). These are not "straw-man arguments" nor a "passing reference" by the Nevada Supreme Court. Opp. at 11-12.

The remainder of this quote does not change the basis of the holding from law of the case doctrine to claim preclusion as Respondents contend. Opp. at 7. The quote, in its entirety, states: "That decision [the interim appeal] stands as law of the case, and its finality precludes the district court from reconsidering the matter and appellants from bringing 'a second action that presents the same claim through a better complaint.'" Pet. App. 1-23 at 6. Like claim preclusion, the law of the case doctrine is a preclusion doctrine. *See Glinka v. Mercedes-Benz Credit Corp. (In re Kelton Motors, Inc.)*, No. 89-00255, 1990 Bankr. LEXIS 1531, at *15 (Bankr. D. Vt. June 25, 1990); *In re Republic Fabricators, Inc.*, 104 B.R. 933, 947 (Bankr. N.D. Ind. 1989); *People v. Lyles*, 567 N.E.2d 396, 399 (Ill. App. Ct. 1990); *Poet v. Thompson (In re Thompson)*, 144 P.3d 1067, 1071 (Or. Ct. App. 2006). As such, when the Nevada Supreme Court referenced "precludes", the Nevada Supreme Court applied the referenced "law of the case." The Nevada Supreme

Court was making a conclusion at variance with its own law, and not providing a new theory of preclusion as the basis of the decision.

No other reading makes sense. Claim preclusion "is triggered when a judgment is entered." *Univ. of Nevada v. Tarkanian*, 879 P.2d 1180, 1191 (Nev. 1994). "Pursuant to the rule of claim preclusion, '[a] valid and final judgment on a claim **precludes a second action** on that claim or any part of it.'" *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 473 (Nev. 1998) (citation omitted) (emphasis added). In order to evaluate a claim preclusion defense, there is a three-part test, to wit: "(1) the same parties or their privies are involved in both cases, (2) a valid final judgment has been entered, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 714 (Nev. 2008).

In this case, there was a dismissal of the state law claims, a timely-filed motion for reconsideration with a motion to amend, which upon denial, resulted in a judgment. *See* Pet. App. 31-33; Pet. App. 50-78; and, App. 5-6. ("App." refers to additional documents attached in an appendix hereto.) **There is, was and has ever been only one lawsuit.** There is no "subsequent action" as required by the third part of the test for claim preclusion and implied by the first part of the test referencing "both cases." Additionally, there was no "final judgment" under the second part of the test when the trial court first ruled on the

issue. The trial order appealed from, Pet. App. 31-33, predates (August 15, 2002) the judgment against Respondents (August 23, 2002), App. 5-6. (Even though this judgment was certified final for the interim appeal pursuant to Nevada Rule of Civil Procedure 54(b), the Nevada Supreme Court found that certification could not apply to the order denying the motion for reconsideration of the dismissal and to amend the complaint. Pet. 27-30 at 28-29 n.4.) Without a subsequent proceeding, claim preclusion simply does not apply.

The Nevada Supreme Court's references to "law of the case" acknowledge that the only arguably applicable theory of preclusion was the law of the case doctrine applying the decision from interim appeal. "The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Serv., LLC*, No. 51778, 2010 Nev. LEXIS 3, at *5 (Nev. Feb. 4, 2010); *Hsu v. County of Clark*, 173 P.3d 724, 728 (Nev. 2007).

Petitioners did not burden the Court with nonsensical arguments about a nonapplicable preclusion theory. As Petitioners are seeking the review of the denial of a motion to amend and not the dismissal of a second lawsuit, the only preclusion theory is law of the case and not claim preclusion. The premise of Respondents' Opposition fails in its entirety.

II. THE NEVADA SUPREME COURT MISAPPLIED THE STATE LAW PRECLUSION DOCTRINES IN ORDER TO AVOID THE FEDERAL QUESTION.

Admittedly the decision of the Nevada Supreme Court purports to be based on the application of a state procedural basis rather than a decision on the merits. Nevertheless, because the decision contradicts the Nevada Supreme Court's own prior and subsequent case law, is unpublished and has the effect of foreclosing a federal claim against state agents, the conclusion is inescapable that the Nevada Supreme Court merely fabricated a contrivance to extricate Respondents from answering for their federal tort in avoidance of having to apply federal law to the action of state employees. Regardless of what the preclusion theory is called, the Nevada Supreme Court could not validly apply any preclusion. To allow any court to claim a lack of jurisdiction to avoid a federal question in an interim appeal and then to claim that that interim appeal gave preclusive effect in the appeal from the final judgment is the epitome of unfairness and unreasonableness.

A. MISAPPLICATION OF CLAIM PRECLUSION

If Respondents are correct that the Nevada Supreme Court was attempting to apply claim preclusion, then this is more support for Petitioners' argument that the Nevada Supreme Court contrived state law to avoid the federal claim. By its own test

for claim preclusion, the Nevada Supreme Court needed a second lawsuit which did not exist in this case. *Five Star Capital Corp.*, 194 P.3d at 713-14 ("[C]laim preclusion applies to preclude an entire second suit . . . "). As such, the Nevada Supreme Court, definitionally, would have been misapplying state law in order to avoid the federal claim. The review sought was of a denial of a motion to amend a complaint, not a dismissal or a judgment from a second lawsuit.

Further, the Nevada Supreme Court could not have relied upon its own decision in the interim appeal as giving rise to claim preclusion. In the interim decision, the Nevada Supreme Court stated that it lacked jurisdiction at that point to consider any order other than the certified dismissal of the state claims pursuant to state discretionary function immunity. Pet. App. 27-30 at 28 n.4.

A decision based upon lack of jurisdiction cannot support claim preclusion.

> '[O]rdinarily a judgment dismissing an action or otherwise denying relief for want of jurisdiction . . . does not preclude a subsequent action in a court of competent jurisdiction on the merits of the cause of action originally involved.' . . . If the court in which an action is brought has no jurisdiction of the subject matter, the suit must be dismissed; 'in such cases the dismissal is not a determination of the claim, but rather a refusal to

> hear it, and the plaintiff is free to pursue it in an appropriate forum.'

Sewell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 94 F.3d 1514, 1518 (11th Cir. 1996) (citations omitted). *See also Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 352 n.29 (5th Cir 1989).

The Nevada Supreme Court has adopted this rule. "While the requirement of a valid final judgment does not necessarily require a determination on the merits, it does not include a case that was dismissed without prejudice or for some reason (jurisdiction, venue, failure to join a party) that is not meant to have preclusive effect." *Five Star Capital Corp.*, 194 P.3d at 713 n.27. *See also Brennan v. EMDE Medical Research, Inc.*, 652 F. Supp. 255, 265 (D. Nev. 1986) ("[T]he Court finds that the Supreme Court of the State of Nevada would not give a Nevada court judgment preclusive effect over matters in which the state courts were not jurisdictionally competent.") In the present matter, because the Nevada Supreme Court found that it lacked jurisdiction at the time of the interim appeal to entertain the denial of the proposed amended complaint to assert the federal claim, the interim appeal could not have any preclusive effect as to the federal question under the extant published Nevada authority.

Indeed, before allowing briefing in the final appeal, the Nevada Supreme Court acknowledged that the decision in the interim appeal was not preclusive.

> Although NRAP 3A(b) does not provide for an independent appeal from an interlocutory order denying a motion for leave to amend a complaint, **when an appeal is taken from a final judgment, an interlocutory order may then be challenged on appeal**. Although appellants are not technically aggrieved by the final judgment, they are aggrieved by the interlocutory order denying their motion to amend, **which can only be challenged in the context of an appeal from the final judgment**. Consequently, we conclude that appellants are aggrieved parties with standing to appeal.

App. 1-4 at 3-4 (citation omitted) (emphasis added). (By finding standing, the Nevada Supreme Court essentially found no claim preclusion. *See Johnson v. Dep't. of Veterans Affairs*, No. CIV-08-430-RAW, 2009 U.S. Dist. LEXIS 33109 (E.D. Okla. Apr. 17, 2009), *aff'd on other grounds*, No. 09-7054, 2009 U.S. App. LEXIS 23749 (10th Cir. Oct. 28, 2009); *Thomas v. Bray*, 400 P.2d 679, 680 (Colo. 1965).)

If the Nevada Supreme Court applied claim preclusion in this matter to defeat the enforcement of Petitioners' federal rights as Respondents contend, then the Nevada Supreme Court was not applying valid non-federal law. Claim preclusion, given the procedural posture of a review of a motion to amend a complaint, was definitionally not applicable. Claim preclusion, given the Nevada Supreme Court's refusal to address the amendment as jurisdictional, was not applicable.

B. MISAPPLICATION OF LAW OF THE CASE DOCTRINE

Since the filing of the Petition for Writ of Certiorari in this matter, the Nevada Supreme Court has filed a decision that dictates the parameters of the law of the case doctrine. That decision further demonstrates that the Nevada Supreme Court did not properly consider or apply those parameters in the present case.

In *Dictor v. Creative Mgmt. Serv., LLC,* No. 51778, 2010 Nev. LEXIS 3, at *5-6 (Nev. Feb. 4, 2010), the Nevada Supreme Court stated:

> The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case. . . . **In order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue** explicitly or by necessary implication. . . . However, the doctrine does not bar a district court from hearing and adjudicating the issues not previously decided, . . . , **and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal**.

Dictor, at *5-6 (citations omitted) (emphasis added). (The Nevada Supreme Court followed the previous decision of *Hsu v. County of Clark*, 173 P.3d 724, 728 (2007). *Dictor*, at *5-6.)

In the present matter, the Nevada Supreme Court did not address the issue of federal qualified immunity as it concerned the 42 U.S.C. § 1983 claim in the proposed amended complaint in the interim appeal. The Nevada Supreme Court explicitly refused to consider the issue citing a lack of jurisdiction. The only issue addressed in the interim appeal was state discretionary function immunity as it applied to the state law claims. The law of the case doctrine cannot be validly applied to the federal question.

Had the Nevada Supreme Court been seriously applying the state law of the case doctrine to this matter, the Nevada Supreme Court would have written the quote from *Dictor* in its opinion in the present matter, decided approximately six months prior to *Dictor*. However, if it had, the Nevada Supreme Court would have been forced to acknowledge the defects with the law of the case doctrine in this matter and would have had to decide that federal qualified immunity would not bar the proposed 42 U.S.C. § 1983 claim. The Nevada Supreme Court would have been forced to acknowledge the document authored by the state officers that the officers lacked evidence to arrest Petitioners but caused Petitioners arrest "under the pretense the money [Petitioners' lawful winnings] is surrendered to the [state] agency so it may be returned to [the casino]." Pet. App. 36-40 at 40. The Nevada Supreme Court would have been forced to find that because of the fabricated evidence, Respondents were not entitled to qualified immunity as a matter of law. *McSherry v. City of Long Beach*,

423 F.3d 1015, 1021-1022 (9th Cir. 2005); *Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004).

In short, the Nevada Supreme Court applied gross procedural machinations to avoid having to hear the merits of this federal issue.

CONCLUSION

The state courts of Nevada erroneously applied state discretionary function immunity to Petitioners' proposed federal claim under 42 U.S.C. § 1983 instead of federal qualified immunity. The Nevada Supreme Court avoided the claim in an interim appeal stating the issue could only be raised in a final appeal. Then, when faced with a final appeal, held that the issue could only be addressed in the interim appeal. Aside from the innate unfairness in this decision, the Nevada Supreme Court reached this conclusion by misapplying purported state procedural law. The Nevada Supreme Court did not have a valid excuse supported by state law to not enforce Petitioners' federal rights.

As such, Petitioners, Michael Russo and James Grosjean, request that this Honorable Court grant writ of certiorari and reverse the Nevada Supreme

Court's decision foreclosing Petitioners' claim under 42 U.S.C. § 1983.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN,

Appellants,

vs.

THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON,

Respondents.

No. 46019

ORDER REINSTATING BRIEFING

(Filed Mar. 30, 2006)

This is an appeal from a district court judgment and an order denying respondent Griffin Investigations' new trial motion.

In this case, appellants filed a tort action naming the respondents listed in the caption of this order, as well as Imperial Palace, Inc., and Donnie Espensen. Respondents State of Nevada Gaming Control Board, and the two named gaming agents, Roderick O'Neal and Charles Pointon, filed a motion to dismiss based on NRS 41.032 immunity. The district court granted the motion and dismissed the action as to those respondents. Appellants filed a motion for reconsideration and also requested leave to amend their complaint to add two additional gaming agents, to

clarify their bad faith argument, and to add a 42 U.S.C. § 1983 claim. The district court denied the reconsideration motion and the request for leave to amend, finding that it would be "futile" and, on appellants' request, certified the judgment as final under NRCP 54(b).

Appellants appealed from the dismissal and also sought to appeal from the denial of their motion for leave to amend their complaint. We affirmed the dismissal order, but concluded that we lacked jurisdiction to consider the order denying appellants' motion for leave to amend on the basis that the order was not susceptible to NRCP 54(b) certification, given that it did not resolve any claim for relief or remove any party from the action.

In the meantime, upon Imperial Palace's motion for severance, the district court bifurcated the claims against Imperial Palace and Donnie Espensen from the claims against Caesars Palace and Griffin Investigations. The portion of the case involving Imperial Palace and Donnie Espensen went to trial and, on January 5, 2005, the district court entered judgment on the jury's verdict, certifying the judgment as final under NRCP 54(b). An appeal and cross-appeal has been taken from that judgment and remains pending in this court.[1]

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[1] *See* Docket No. 44542.

Subsequently, on the claims that remained pending in the district court against respondents Caesars Palace and Griffin Investigations, a jury returned a verdict in favor of appellants, and judgment was entered on that verdict. After the district court denied respondent Griffin Investigations' motion to alter or amend the judgment, for remitttur, and/or for a new trial, appellants appealed. This appeal, Docket No. 46019, is the subject of this order.

After reviewing the docketing statement and supporting documents, we directed appellants to demonstrate that they were aggrieved parties with standing to appeal. Appellants have responded, conceding that they were not aggrieved by the final judgment. Instead, they assert that they seek to challenge the interlocutory order denying their motion for leave to amend their complaint.

Although NRAP 3A(b) does not provide for an independent appeal from an interlocutory order denying a motion for leave to amend a complaint, when an appeal is taken from a final judgment, an interlocutory order may then be challenged on appeal.[2] Although appellants are not technically aggrieved by the final judgment, they are aggrieved by the interlocutory order denying their motion to amend, which can only be challenged in the context of an appeal from the final judgment. Consequently, we

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[2] *Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

conclude that appellants are aggrieved parties with standing to appeal. Accordingly, the briefing schedule is hereby reinstated. Appellants shall have seventy days from the date of this order within which to file and serve the opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

It is so ORDERED.

/s/ Becker, J.
Becker

/s/ Gibbons, J.
Gibbons

/s/ Hardesty, J.
Hardesty

cc: Hon. Lee A. Gates, District Judge
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

* * *

MICHAEL RUSSO and JAMES GROSJEAN, Plaintiff,	)	
v.	)	
GRIFFIN INVESTIGATIONS, INC., a Nevada Corporation; IMPERIAL PALACE, INC., a Nevada Corporation; PARK PLACE ENTERTAINMENT CORPORATION, a Delaware Corporation dba Caesars Palace; RODERICK O'NEAL; STATE OF NEVADA/NEVADA GAMING CONTROL BOARD; CHARLES POINTON; and	)	Case No. A442687 Dept No. VIII

DOES I-CC, ROES I through XXX, jointly and severally,

Defendants

JUDGMENT IN FAVOR OF STATE GAMING CONTROL BOARD, CHARLES POINTON AND RODERICK O'NEAL

(Filed Aug. 23, 2002)

Since the Plaintiffs' complaint fails to state a claim upon which relief can be granted against Defendants State Gaming Control Board, Roderick O'Neal and Charles Pointon, Plaintiffs' claims against these Defendants are dismissed with prejudice.

IT IS HEREBY ORDERED that since there is no just reason for delay, judgment is entered in favor of Defendants State Gaming Control Board, Roderick O'Neal and Charles Pointon and against Plaintiffs, and Defendants State Gaming Control Board, Roderick O'Neal and Charles Pointon shall recover their costs from Plaintiffs.

DATED: August 22, 2002

/s/ **LEE A. GATES**
LEE A. GATES
DISTRICT COURT JUDGE